SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 2[illegible]

VICTOR J. HERB,

Petitioner,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS FOR WABASH RAILWAY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

ROBERTS P. ELAM,
Counsel for Petitioner.

MARK D. EAGLETON,
JOSEPH B. MCGLYNN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 681

VICTOR J. HERB,

Petitioner,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS FOR WABASH RAILWAY COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Victor J. Herb, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Illinois, and to remove therefrom to this Court for review, the record in the case lately pending in said Supreme Court of the State of Illinois, styled Victor J. Herb, plaintiff-appellant, vs. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, a corporation,

defendants-appellees, being cause No. 27,275 on the docket of said Supreme Court of the State of Illinois.

The duly certified record, including all the proceedings in the City Court of Granite City, Illinois, wherein said cause was instituted, in the Circuit Court of Madison County, Illinois, to which the venue of said cause was changed and in which judgment was entered, and in the Supreme Court of the State of Illinois, to which an appeal was taken by said Victor J. Herb from the judgment of the trial court, is filed herewith under separate cover.

Your petitioner represents that he is aggrieved by the judgment of the Supreme Court of the State of Illinois entered in said cause, wherein the said Supreme Court of Illinois affirmed the judgment of the trial court, and on the 12th day of November, 1943, thereafter, denied this petitioner's petition for a rehearing of said cause, and entered a final judgment affirming the judgment of the trial court.

Your petitioner states that the matters of issue in said cause are of a Federal nature and are of peculiar gravity and importance, in that said suit was brought under the Federal Employers' Liability Act to recover damages for personal injuries sustained by this petitioner on November 23, 1936, as a result of the violation of the Federal Safety Appliance Act by the respondents Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, a corporation, and in that the decision of the Supreme Court of the State of Illinois, complained of, is in conflict with the applicable decisions of this Honorable Court upon the questions involved, and the principles announced by this Court in those decisions.

Summary and Short Statement of the Matter Involved.

On December 22, 1937, this petitioner, as plaintiff, filed in the City Court of Granite City, Illinois, his complaint

against the respondents, as defendants (R. 12), stating a cause of action against said respondents under the Federal Employers' Liability Act (U. S. C. [1934 Ed.] Title 45, §§ 51-59) for injuries sustained by this petitioner in or near the City of Decatur, Illinois, on the 23rd day of November, 1936 (R. 9), by reason of an alleged violation by respondents of the provisions of the Federal Safety Appliance Act (U. S. C. [1934 Ed.] Title 45, §§ 1-16) relating to hand brakes. Summons was duly issued and served upon the respondents (R. 12).

Thereafter, on February 28, 1938, the respondents filed in said City Court of Granite City, Illinois, their answer (R. 12-18) by way of denial of various of the allegations of the complaint, coupled with a plea of assumption of risk.

Thereafter, on March 5, 1938, petitioner duly filed in said City Court of Granite City, Illinois, his reply to said answer (R. 18).

Thereafter, on October 13, 14 and 15, 1938, the case was duly tried to a jury in the said City Court of Granite City, Illinois (R. 2-3), resulting in a verdict in favor of this petitioner, as plaintiff, and against respondents, as defendants, in the sum of $30,000.00 (R. 3, 19), but thereafter this verdict was set aside and a judgment entered for respondents (defendants) non obstante veredicto (R. 4). This petitioner duly appealed from the judgment non obstante veredicto (R. 4-5, 19; cf. *Herb* v. *Pitcairn*, 306 Ill. App. 583, 29 N. E. 2d 543, and *Herb* v. *Pitcairn*, 377 Ill. 405, 36 N. E. 2d 555). As a result of that appeal, the judgment entered non obstante veredicto was reversed, and the cause was remanded to the City Court of Granite City, Illinois, for further proceedings (R. 19-21).

Thereafter, and after the action had been re-docketed in the City Court of Granite City, Illinois (R. 23-24), the Supreme Court of Illinois decided the cases of *Wemer* v. *Illi-*

nois Central Railroad Co., 379 Ill. 559, 42 N. E. 2d 82, and *Mitchell* v. *Louisville & N. R. Co.*, 379 Ill. 522, 42 N. E. 2d 86, ruling, in substance and effect, that each of the various City Courts in Illinois was without jurisdiction to hear and determine the subject matter of any action involving a cause of action which arose outside the territorial limits of the City in which the particular City Court was located. Accordingly, this petitioner thereafter filed in the City Court of Granite City, Illinois, a motion for a change of venue in this action to the Circuit Court of Madison County, Illinois, under the provisions of Chapter 146, Section 36, Illinois Revised Statutes, 1941, because the action had been commenced in the wrong court—that is, in a court which, under the decisions in *Werner* v. *Illinois Central Railroad Co.*, *supra*, and *Mitchell* v. *Louisville & N. R. Co.*, *supra*, was without jurisdiction to hear and determine the subject matter of petitioner's action, because the cause of action had arisen outside the territorial limits of Granite City, Illinois (R. 24-25). Petitioner's motion for a change of venue was, on July 17, 1942, sustained by the said City Court of Granite City, Illinois, and the venue of said action was duly ordered changed to the Circuit Court of Madison County, Illinois (R. 5-6). On July 31, 1942, the pleadings, papers, documents and exhibits, and a duly certified transcript of all the orders, in said cause in the said City Court of Granite City, Illinois, were duly filed in the said Circuit Court of Madison County, Illinois, on change of venue (R. 1-7).

Thereafter, on August 21, 1942, the respondents (defendants) filed in the Circuit Court of Madison County, Illinois, their motion to dismiss petitioner's (plaintiff's) cause (R. 26-30). That motion to dismiss was based, substantially, upon the grounds that, because the said City Court of Granite City, Illinois, was without jurisdiction to hear and determine the subject matter (merits) of plaintiff's action,

(a) all orders entered, and all proceedings had, in said City Court of Granite City, Illinois, including the order changing the venue in said action to the said Circuit Court of Madison County, were null, void and of no effect, (b) if the statute under which the change of venue was granted (Chapter 146, Section 36, Illinois Revised Statutes, 1941) authorizes a City Court to change the venue of an action, of which it is without jurisdiction to hear and determine the merits, to a court properly having jurisdiction to hear and determine the action, then such statute is contrary to Section 1, Article VI of the Constitution of Illinois, and is null and void, and (c) such statute, if it authorizes a change of venue under such circumstances, is in conflict with Section 6 of the Federal Employers' Liability Act (U. S. C. [1934 Ed.] Title 45, § 56), and is null and void.

This motion of respondents (defendants), to dismiss, was by the said Circuit Court of Madison County, Illinois, sustained on November 27, 1942, and judgment of dismissal was then entered accordingly (R. 30-31). From that order and judgment, petitioner (plaintiff) duly appealed to the Supreme Court of the State of Illinois (R. 32-33), where the judgment of the Circuit Court of Madison County, Illinois, was, on September 24, 1943, affirmed (R. 35-44).

This petitioner, in due time, filed in the said Supreme Court of Illinois his petition for a rehearing (R. 45-56), which was entertained, but on the 12th day of November, 1943, the said Supreme Court of Illinois denied said petition for a rehearing (R. 57). The said Supreme Court of Illinois having denied petitioner's petition for rehearing on said date, the judgment of said Court thereupon became final.

Opinions of the Courts Below.

There was no opinion of the trial court in the case here sought to be reviewed.

The opinion of the Supreme Court of the State of Illinois appears at pages 35-43, inclusive, of the printed transcript of the record herewith filed. It is reported as *Herb* v. *Pitcairn, et al.*, 384 Ill. 237, 51 N. E. 2d 277.

Jurisdiction of this Court.

1.

Jurisdiction of this Court is based upon the Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Stat. 937, U. S. Code, Title 28, Section 344, paragraph (b) permitting petitions for certiorari to be prayed for and issued to the highest courts of the various states where a title, right, privilege or immunity is specially set up or claimed under a statute of the United States.

The action here sought to be reviewed having been based upon the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65, as amended by Act of Apr. 5, 1910, c. 143, 36 Stat. 291; U. S. C. [1934 Ed.] Title 45, §§ 51-59), and the Federal Safety Appliance Act (Act of Mar. 2, 1893, c. 196, 29 Stat. 531, as amended by Act of Mar. 2, 1903, c. 976, 32 Stat. 943 and Act of Apr. 14, 1910, c. 160, 36 Stat. 298; U. S. C. [1934 Ed.] Title 45, §§ 1-16), the jurisdiction of this Court attaches because the Supreme Court of Illinois, in affirming the judgment of the trial court, has decided a Federal question of substance in a way probably not in accord with the applicable and controlling principles and decisions of this Court. Some authorities sustaining the jurisdiction are:

Seaboard Air Line R. Co. v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062;

Minneapolis, St. P. & S. S. M. R. Co. v. *Gotcan*, 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335.

Gulf M. & N. R. Co. v. *Wells*, 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370;
Atlantic Coast Line R. Co. v. *Davis*, 279 U. S. 34, 49 S. Ct. 210, 73 L. Ed. 601.

2.

The Supreme Court of Illinois is the highest court of that State.

The original date of the judgment of the Supreme Court of Illinois here sought to be reviewed is September 24, 1943.

Petitioner's motion for a rehearing was filed October 19, 1943, within the time provided by the rules of the Supreme Court of Illinois, and said petition for rehearing was denied November 12, 1943.

Questions Presented.

Only one basic question is raised in this Court on this record, viz: Whether an action under the Federal Employers' Liability Act, instituted within two years from the day the cause of action accrued, in a State court which was without jurisdiction to hear and determine the merits of the action but which had a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereof, the venue of which action was changed to such latter court more than two years after the cause of action accrued, is "commenced within two years from the day the cause of action accrued" as required by Section 6 of the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.] Title 45, § 56).

Subsidiary to this main question, there is the question of whether Section 6 of the Federal Employers' Liability Act requires suits brought under that Act in State courts to be commenced in a State court which has full and complete jurisdiction over the action.

Summary of Reasons for Allowance of Writ.

I.

In this case the Supreme Court of Illinois has decided a Federal question of substance, not heretofore determined by this Court upon a like statement of facts, in a way probably not in accord with the applicable and controlling principles and decisions of this Court.

The question is one of a general nature, involving the rights and affecting the interests of an extensive class of employees of interstate carriers by railroad, and involving the rights and liabilities of such carriers.

II.

The Supreme Court of Illinois has erroneously ruled that

(a) Recovery under the Federal Employers' Liability Act is conditioned not only upon commencing an action within two years from the date of the injury, but also upon commencing such action within such time in a Court having jurisdiction to hear and determine the same—that is, that it is not enough for the action to be commenced in a Court having a limited jurisdiction over the action, but it must be commenced in a Court having full and complete jurisdiction.

(b) Where an action under the Federal Employers' Liability Act is instituted, within two years from the day the cause of action accrued, in a State court which was without jurisdiction to hear and determine the merits of the action but which had a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereover, the action is not "commenced within two years from the day the cause of action accrued" as required by Section 6 of the Federal Employers' Liability Act, if the

change of venue to the latter court takes place more than two years after the day the cause of action accrued.

III.

The opinions and decisions of this Court, as well as those of other Federal courts hold that

(a) The Federal Employers' Liability Act is a remedial act which should be construed liberally so as to prevent the mischief and advance the remedy.

(b) The State courts, where their jurisdiction is appropriate, have concurrent jurisdiction with the Federal courts over actions under the Federal Employers' Liability Act.

(c) Where an action under the Federal Employers' Liability Act is brought in a State court, that court not only can, but must, exercise such jurisdiction as it may have over the action.

(d) An action or suit is commenced when a party puts in motion, under his claim, the instruments or process of a court of justice.

It follows that, under the controlling decisions of this Court, where (as here) an action under the Federal Employers' Liability Act is instituted, within two years from the day the cause of action accrued, in a State court which is without jurisdiction to hear and determine the merits of the action but which has a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereof, the action is "commenced within two years from the day the cause of action accrued" as required by Section 6 of the Federal Employers' Liability Act, notwithstanding that the change of venue to the latter court actually took place more than two years after the cause of action accrued.

Prayer.

For the purpose of correcting the errors complained of, and to the end that the rights of the petitioner may be determined in accordance with the Federal law, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding it to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Supreme Court of Illinois in the within described cause of Victor J. Herb, plaintiff-appellant, *vs.* Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, a corporation, defendants-appellees, No. 27,275, to the end that the judgment of said Supreme Court of Illinois in said cause may be reviewed by this Court, as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate, and that the judgment of said Supreme Court of Illinois may be reversed by this Honorable Court.

VICTOR J. HERB,
Petitioner.
By ROBERTS P. ELAM,
Counsel for Petitioner.

MARK D. EAGLETON and
JOSEPH B. MCGLYNN,
Of Counsel.

SUPPORTING BRIEF.

I.

Under the law of Illinois, where (as here) a suit, action or proceeding is commenced in a court of record, but in the wrong court because that court lacks jurisdiction over the parties or the subject matter, or both, the court nevertheless has a limited jurisdiction to change the venue to a proper court, and any of the parties is entitled, upon motion, to such a change of venue, irrespective of whether such motion is made before or after trial; and the taking of such a change of venue does not constitute a commencement of a new action in the court to which the venue is changed, but constitutes merely one step or proceeding in the prosecution of the action commenced in the court from which the venue is changed.

Illinois Revised Statutes 1941, Chap. 146, § 36;
Illinois Revised Statutes 1941, Chap. 146, §§ 15, 16;
Illinois Revised Statutes 1941, Chap. 37, § 346;
Central Illinois Public Service Co. v. *Industrial Commission*, 293 Ill. 62, 127 N. E. 80;
Gill v. *Lynch*, 367 Ill. 203, 10 N. E. 2d 812.

II.

Petitioner's action was "commenced" within two years from the day his cause of action accrued, as required by Section 6 of the Federal Employers' Liability Act.

A. The question of when a suit is commenced in a State court is a matter which the Federal courts recognize as being controlled generally by the practice in the particular State.

Goldenburg v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686;

Chesapeake & O. R. Co. v. *De Atley*, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016;

Minneapolis & St. L. R. Co. v. *Bombolis*, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961;

Act of April 8, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of April 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.], Title 45, § 56.

B. Petitioner's action was commenced on the day his complaint was filed in the City Court of Granite City, Illinois.

Illinois Revised Statutes 1937, Chap. 110, § 129;

Milwaukee Mechanics Ins. Co. v. *Schallman*, 188 Ill. 213, 59 N. E. 12;

Randall Dairy Co. v. *Pevely Dairy Co.*, 278 Ill. App. 350;

Cohens v. *Virginia*, 6 Wheat. [19 U. S.] 264, 5 L. Ed. 257;

Illinois Revised Statutes 1941, Chap. 110, § 129.

C. The change of venue in petitioner's action from the City Court of Granite City to the Circuit Court of Madison County, which took place more than two years after the cause of action accrued, does not affect the fact that such action was commenced in the City Court within the two-year period.

Authorities Cited, *supra*.

III.

In ruling that recovery under the Federal Employers' Liability Act was conditioned not only upon the commencing of an action within two years from the day the cause of action accrued, but also upon commencing such action in a court having jurisdiction to hear and determine the same, the decision of the Supreme Court of Illinois in this case

has construed Section 6 of that Act in such a way as to not require a State court to exercise its jurisdiction over an action under the Act, and to discriminate between rights arising under that Act and rights arising under State laws, contrary to principles announced by this Court.

A. The Act does not expressly or impliedly make any such requirement as to the character of the power of the court in which the action is brought.

Act of April 8, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of April 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.], Title 45, § 56.

B. The Act, being a remedial one, is to be liberally construed so as to advance the remedy proposed and correct the evils against which it was directed.

Jamison v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082.

C. A State court having jurisdiction over an action under the Act not only can, but must, exercise such jurisdiction.

Second Employers' Liability Cases [*Mondou* v. *New York, N. H. & H. R. Co.*], 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327;

McKnett v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227;

Miles v. *Illinois Central R. Co.*, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. —.

D. A State may not discriminate against rights arising under Federal laws.

McKnett v. *St. Louis & S. F. R. Co.*, *supra*.

ARGUMENT.

I.

Some prefatory discussion of several phases of Illinois law is necessary to a comprehensive understanding of the particular questions here involved.

The Circuit Courts in Illinois are courts of general original jurisdiction in civil cases (Constitution of Illinois of 1870, Art. VI, § 12).

The City Courts in that State are courts of record (Illinois Revised Statutes 1941, Chap. 37, § 333; *East St. Louis Connecting Ry. Co.* v. *Enright*, 47 Ill. App. 494). That such City Courts were courts of general jurisdiction in civil cases, having concurrent jurisdiction with the Circuit Courts within the City in such cases, for many years had been assumed (*cf. Helmuth* v. *Bell* [1894], 150 Ill. 263, 37 N. E. 230; *Herb* v. *Pitcairn* [1941], 377 Ill. 405, 36 N. E. 2d 555), and on occasions expressly declared (*Baker* v. *Rockabrand*, 118 Ill. 365, 371, 8 N. E. 456; *Miller* v. *People*, 183 Ill. 423, 426, 56 N. E. 60; *Smith* v. *Herdlicka*, 323 Ill. 585, 590, 154 N. E. 414; *Knickerbocker Ice Co.* v. *Leyda*, 128 Ill. App. 66, 69; *Konow* v. *Nichols*, 128 Ill. App. 409, 413; *Torpedo Top Co.* v. *Royal Ins. Co.*, 162 Ill. App. 338, 340-341; *Swanson* v. *Malm*, *R. I. & E. Trac. Co.*, 204 Ill. App. 144, 156-146; *Buchanan* v. *Scottish Union & Nat'l Ins. Co.*, 210 Ill. App. 523, 525). However, on March 16, 1942, in the cases of *Werner* v. *Illinois Central R. Co.*, 379 Ill. 559, 42 N. E. 2d 82, and *Mitchell* v. *Louisville & N. R. Co.*, 379 Ill. 522, 42 N. E. 2d 86, the Supreme Court of Illinois ruled, in substance and effect, that each of the City Courts in that State was without jurisdiction to hear and determine the subject matter of any action involving a cause of action arising outside the territorial limits of the City in which such court was located.

The Illinois statutes relating to the mechanics of a change

of venue from one court to another are typical of such statutes generally. Illinois Revised Statutes 1941, Chap. 146, § 15, in so far as here relevant, provides:

> "In all cases of change of venue, the clerk of the court from which the change is granted shall immediately make out a full transcript of record and proceedings in the case, and of the petition, affidavits and order for the change of venue, and transmit the same, together with all the papers filed in the case, to the proper court: * * *. Such transcript and papers or copies may be transmitted by mail, or in such other way as the court or judge may direct."

while § 16 of that same chapter of the Illinois statutes further provides:

> "The clerk of the court to which the change of venue is granted shall file the transcript and papers transmitted to him and docket the cause, and such cause shall be proceeded in and determined in all things, as well before as after judgment, *as if it had originated in such court.*" (Emphasis supplied.)

With respect to changes of venue from the City Courts, Illinois Revised Statutes 1941, Chap. 37, § 346, in so far as here relevant, provides:

> "Change of venue from city courts, *for the same causes* and in the same manner, may be taken as from circuit courts, and the cases sent to any other city court, or to any circuit court, or to any other court of competent jurisdiction where the cause complained of does not exist." (Emphasis suppplied.)

A remarkable statute upon change of venue is Illinois Revised Statutes 1941, Chap. 146, § 36 (sometimes referred to as the "Illinois Venue Act" or the "Venue Act of 1891"), which provides:

> "That wherever any suit or proceeding shall hereafter be commenced, in any court of record in this

State, and it shall appear to the court where the same is pending, that the same has been commenced in the wrong court or county, then upon motion of either or any of the parties to suit or proceeding, the court shall change the venue of such suit or proceeding to the proper court or county, and the same when the venue shall be so changed, shall be then pending and triable in such court or county to which the same shall be so changed the same as in other cases of change of venue: *Provided*, that where either party to such suit or proceeding shall procure the change of venue as herein provided for, that the court shall require the plaintiff in said suit to pay all costs in such suit or proceeding, up to and including the costs of the change of venue except such costs, if any there are, as shall have been made or occasioned by answer to the merits and a trial thereon, if any such shall have been had or made, and such costs, if any, caused by answer to the merits and trial thereon shall abide the final result of such suit or proceeding the same as in other cases of change of venue."

This last quoted statute was construed and applied by the Supreme Court of Illinois in *Central Illinois Public Service Co.* v. *Industrial Comm.*, 293 Ill. 62, 127 N. E. 80. That case involved a certiorari proceeding to review an award of the Illinois Industrial Commission under a statute which required that such proceeding be "commenced" within twenty days after the decision of the Industrial Commission and in the Circuit Court of the County in which the defendant might be found. B. L. Kirk, the administrator of the deceased employee, was the defendant, and lived and could be found only in Champaign County. Despite this, the certiorari proceeding was commenced in the Circuit Court of Coles County, but within the statutory period. Kirk was served with notice by mail as provided by the statute, but entered only a special appearance to contest the jurisdiction of the Circuit Court of Coles County. Vari-

ous proceedings in the case were had, and, some six months after the action had been commenced, a motion was filed by the plaintiff, under the Illinois Venue Act (now Illinois Revised Statutes 1941, Chap. 146, § 36), for a change of venue to the Circuit Court of Champaign County. This motion for change of venue was granted on the same day it was filed, and the mechanics of the change of venue were completed. Kirk then entered his special appearance in the Circuit Court of Champaign County and moved to quash the writ of certiorari upon the grounds that the proceeding had not been commenced within the time limited by statute, that the Circuit Court of Coles County never acquired jurisdiction, and that the Circuit Court of Champaign County, therefore, never acquired jurisdiction upon the change of venue being made. The trial court sustained this motion and dismissed the writ of certiorari. On appeal from this ruling, the Supreme Court of Illinois said:

> "* * * the circuit court of Coles county did not have jurisdiction either of the person of the administrator or the subject matter of the suit" (127 N. E., l. c. 82),

but in reversing the ruling of the trial court, in holding that the case properly had been commenced and transferred to the Circuit Court of Champaign County on change of venue, and in remanding the case for a trial upon the merits in that court, the Supreme Court of Illinois said (127 N. E., l. c. 82):

> "* * * it is evident that by the use of the term 'commenced in the wrong court or county,' *the Legislature intended to reach those cases begun in courts not having jurisdiction of the subject-matter* as well as those where jurisdiction of the parties, alone, is lacking. This is a provision of the law evidently enacted for the purpose of simplifying procedure and preventing the loss of substantial rights through a misunder-

standing as to what forum should be used to obtain such rights. *By this act it is evident that the Legislature intended to and did confer on all courts of record in this state, without regard to any other jurisdiction either conferred upon or denied it by common law or statute, jurisdiction to 'change the venue of such suit or proceeding to the proper court or county.'* It cannot be doubted that the power to confer that limited jurisdiction lies within the powers of the Legislature, and we are of the opinion that in the instant case, while the circuit court of Coles county had no jurisdiction of the subject-matter involved for any other purpose than that defined in the Venue Act of 1891 and could therefore enter no order affecting the rights of the parties under the award made, that court was by said act empowered to transfer the cause to the proper county, which in this case was Champaign county, and under said act when said transfer was made the cause was from that time forward pending in the circuit court of Champaign county." (Emphasis supplied.)

The above quoted decision was cited and applied in *Gill v. Lynch*, 367 Ill. 203, 10 N. E. 2d 812, and, so far as we can determine, has never been modified nor weakened in the slightest degree.

From the foregoing statutes and authorities it appears that, under the law of Illinois:

(a) Irrespective of any other jurisdiction conferred upon or denied it, every court of record in Illinois — including the various City Courts — has a limited jurisdiction over every suit or proceeding commenced or pending therein, empowering such court upon application of any party to change the venue of such suit or proceeding to the proper court or county.

(b) The institution of a suit or proceeding in a court of record within the time required by law, even though the suit or proceeding be instituted in a court which does not have jurisdiction over the parties defendant or the subject matter of the suit, or both, constitutes the "commencement" of the action within the time re-

quired by law, by reason of the limited jurisdiction of the court to transfer the cause to the proper court or county by a change of venue.

(c) The matter of effecting a change of venue of a suit under the Illinois Venue Act, from a court of record which is without full jurisdiction (i. e., the "wrong court") to a court which has full jurisdiction (i. e., the "proper court") does not constitute the "commencement" of the action in the latter court, but constitutes merely one of the proceedings in the prosecution of the action which was "commenced" in the former court.

To further summarize: It appears to be established under the law of Illinois that, where a suit or proceeding is commenced in a court of record in that State, but in the wrong court because that court lacks jurisdiction over the parties or the subject matter, or both, any of the parties is entitled, upon motion, to a change of venue of the action to a proper court, irrespective of whether such motion is made before or after trial; and the taking of such a change of venue does not constitute a commencement of the action in the court to which the transfer is made, but constitutes merely one step or proceeding in the prosecution of the action deemed "commenced" in the court from which the transfer is taken.

II.

In view of the well-settled doctrines, that in actions brought in a State court the Federal Courts will follow the practice of the State in determining when an action is commenced (*Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686), and that the practice and procedure in actions brought under the Federal Employers' Liability Act in a State court will be governed by the law of the State in which such court is located (*Chesapeake & O. R. Co.* v. *De Atley*, 241 U. S. 310, 317, 36 S. Ct. 564, 60 L. Ed. 1016; *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, 36

S. Ct. 595, 60 L. Ed. 961), there can be little room for doubt about the applicability of the Illinois doctrines which we have just above discussed in determining whether the case at bar was "commenced" within the time required by Section 6 of the Federal Employers' Liability Act (Act of April 8, 1908, c. 149, § 6, 35 Stat. 66, as amended by the Act of April 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.], Title 45, § 56), which, in so far as here relevant, provides:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued * * *. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, * * *."

This petitioner's cause of action accrued at Decatur, Illinois, on the date of his injury, November 23, 1936 (R. 8-9, 13). On December 22, 1937, as plaintiff he filed in the City Court of Granite City, Illinois, his complaint alleging a cause of action under the Federal Employers' Liability Act (R. 7-12), and had a summons issued out of that court for the defendants (R. 12). Thus, his action was "commenced" in December, 1937, well within "two years from the day the cause of action accrued" whether his action be said to be "commenced" when the process (summons) was issued, as was the rule at common law and under the Illinois Civil Practice Act prior to its amendment on July 6, 1937 (*Cohens v. Virginia*, 6 Wheat. [19 U. S.] 264, 408, 5 L. Ed. 257, 292; Illinois Revised Statutes 1937, Chap. 110, § 129; *Milwaukee Mechanics Ins. Co.* v. *Schallman*, 188 Ill. 213, 220, 59 N. E. 12; *Randall Dairy Co.* v. *Peccly Dairy Co.*, 278 Ill. App. 350, 351), or when the complaint was filed, as is the rule under the Illinois Civil Practice Act since its amendment in 1937 (Illinois Revised Statutes 1941, Chap. 110, § 129). Thereafter, this petitioner prosecuted his action with due dili-

gence, and it was due only to the decisions of the Illinois Supreme Court, over four years later, in *Werner* v. *Illinois Central R. Co.*, *supra*, and *Mitchell* v. *Louisville & N. R. Co.*, *supra*, that the jurisdiction of the City Court of Granite City over his action was determined to be limited, so as to require a change of venue to the Circuit Court of Madison County. Effecting that change of venue did not, under the applicable Illinois law, constitute a dismissal of petitioner's action in the City Court of Granite City and the commencement of his action in the Circuit Court of Madison County, but, on the contrary, constituted merely another step or proceeding in the prosecution of his action which was commenced in the City Court and transferred to the Circuit Court. The City Court of Granite City was not wholly without jurisdiction of petitioner's action, although its jurisdiction over his action was a limited one—limited to the granting of a change of venue to a court having full jurisdiction. The fact that such change of venue took place more than two years after the day petitioner's cause of action accrued is immaterial in determining whether his action was "commenced" within two years from the day the cause of action accrued.

III.

The Supreme Court of Illinois, notwithstanding the matters hereinbefore discussed, ruled that this action by petitioner was not commenced within two years after the cause of action accrued, and based such ruling upon its interpretation of Section 6 of the Federal Employers' Liability Act as follows (R. 38-39; 51 N. E. 2d, l. c. 280):

> "* * * we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) *commencing such action in a court having jurisdiction to hear and determine the*

> *same.* * * * The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit *and of bringing it in a court having jurisdiction to hear and determine it.*" (Emphasis supplied)

We submit that Section 6 of the Liability Act does not require that actions thereunder, in order to comply with the requirement relating to the time within which they must be commenced, must be brought within that time in a court having jurisdiction to hear and determine the merits of the action—that is to say, full and complete jurisdiction over the cause. There is no specific language in that section of the Act making, or even suggesting, any such requirement as to the character of the power of the Court in which the action is brought, and so far as we have been able to determine neither this Court nor any other Federal court has interpreted this section to contain such a requirement.

On the contrary, the implications from the decisions of this Court construing this Act clearly indicate that this section should not be so narrowly construed as the Supreme Court of Illinois has construed it. The Act is a remedial one, and, like all remedial legislation, should be liberally construed so as to advance the remedy proposed and correct the evils against which it was directed (*Jamison* v. *Encarnacion*, 281 U. S. 635, 640, 50 S. Ct. 440, 74 L. Ed. 1082). Section 6 of the Act does not vest in the State courts concurrent jurisdiction with the Federal courts over actions under the Act, but, conversely, vests in the Federal courts "concurrent jurisdiction with that of the courts of the several States" over such actions. It is familiar doctrine that, in the absence of a constitutional or a statutory restriction of jurisdiction over an action or proceeding to the Federal courts or tribunals, the courts of the several States have jurisdiction to enforce rights arising under the Constitu-

tion and laws of the United States (*Cohens* v. *Virginia*, 6 Wheat. [19 U. S.] 264, 396-397, 5 L. Ed. 257; *Claflin* v. *Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833; *Robb* v. *Connolly*, 111 U. S. 624, 637, 4 S. Ct. 544, 28 L. Ed. 542; *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479, 56 S. Ct. 343, 80 L. Ed. 331), and in line with this doctrine it is held that, where an action under the Federal Employers' Liability Act is brought in a State court which has jurisdiction over the action, that Court not only can, but must, exercise its jurisdiction (*Second Employers' Liability Cases* [*Mondou* v. *New York, N. H. & H. R. Co.*], 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327; *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227; *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. ——).

It necessarily conflicts with and narrows these principles to construe Section 6 of the Federal Employers' Liability Act as the Supreme Court of Illinois did construe it, so as to require that an action brought in a State court under the Act, in order to meet the requirements of that section as to the time within which the action can be commenced, not only must be brought within such time, but also must be brought in a court having jurisdiction to hear and determine the merits of the action. The effect of the decision of the Supreme Court of Illinois in this case is to rule that a State court having a limited jurisdiction over an action under the Federal Employers' Liability Act is not under a duty to exercise that limited jurisdiction. Furthermore the effect of the decision of the Supreme Court of Illinois is, in view of its decision in *Central Illinois Public Service Co.* v. *Industrial Commission*, *supra*, to discriminate in that regard between rights accruing under the Federal Employers' Liability Act and rights accruing under State laws—for it appears that if this petitioner's cause of action had accrued under the laws of Illinois it would, under the

authority of *Central Illinois Public Service Co.* v. *Industrial Commission, supra*, have been held to have been "commenced" within two years from the day the cause of action accrued.

> "The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws." (*McKnett* v. *St. L. & S. F. R. Co.*, 292 U. S., l. c. 234).

To uphold the construction placed upon Section 6 of the Federal Employers' Liability Act by the Supreme Court of Illinois necessarily would result in an anomalous doctrine that a State court having a limited jurisdiction over an action to enforce a federal right would not be obliged to exercise that limited jurisdiction, while a State court having full jurisdiction over the action would be compelled to exercise its jurisdiction thereover.

IV.

It may be suggested that petitioner contends that the trial and verdict had in this action in the City Court of Granite City are valid, but petitioner does not intend to be so understood. On the contrary, petitioner recognizes the invalidity of that trial and judgment in the light of the decisions in *Werner* v. *Illinois Central R. Co.*, *supra*, and *Mitchell* v. *Louisville & N. R. Co.*, *supra*, and recognizes that all proceedings in the said City Court, excepting those relating to the change of venue to the Circuit Court, were void. He does, however, insist that his action was "commenced" within the time required by Section 6 of the Federal Employers' Liability Act in a court which had a limited jurisdiction over the action, with the power and authority to change the venue of the action, either before or after trial, to a court having full jurisdiction thereover, so that, upon the venue being changed to the Circuit Court of Madison

County, that court was invested with full jurisdiction to hear and determine the action, and petitioner was and is entitled to a hearing and determination of his cause on the merits in said Circuit Court.

It also might be suggested that petitioner's action was not "commenced" within the time required by Section 6 of the Federal Employers' Liability Act because, the jurisdiction of the City Court of Granite City being limited to a granting of a change of venue under the Illinois Venue Act, that court did not acquire jurisdiction over the persons of the respondents (defendants) by virtue of the summons issued out of that court. The fact is, however, that the City Court of Granite City acquired jurisdiction over the persons of respondents (defendants), wholly irrespective of the validity of the summons, when the respondents appeared generally and filed their answer in that court (R. 12-18), under which circumstances the issuance and service of summons was not essential to the commencement of the action (*Kobelein v. First National Bank of St. Elmo*, 376 Ill. 450, 34 N. E. 2d 388). Furthermore, the question of when petitioner's action was commenced was and is not dependent upon the acquisition of jurisdiction of the persons of respondents (defendants) by the City Court of Granite City, for, as was said in *Vincent v. McElvain*, 304 Ill. 160, 136 N. E. 502, 503:

> "It is well established by repeated decisions of this and other courts that a suit or action is commenced when a party puts in motion, under his claim, the instruments of the court. * * *. We know of no authority which holds that a suit is not commenced until the court gets jurisdiction of the defendant."

To this same effect are the decisions in *Central Illinois Public Service Co. v. Industrial Commission*, *supra*, and *Bates Mfg. Co. v. United States*, 303 U. S. 567, 58 S. Ct. 694,

82 L. Ed. 1020. In this connection, too, there should not be overlooked the amendment of July 6, 1937, to the Illinois Civil Practice Act (Laws of Illinois, 1937, p. 989; Illinois Revised Statutes 1941, chap. 110, (129) providing, in so far as here relevant, that:

> "Every civil action, unless otherwise expressly provided by statute shall be commenced by the filing of a complaint."

Conclusion.

From the foregoing, we submit that it clearly appears that petitioner's action was "commenced" within two years from the day his cause of action accrued in a court which had a limited jurisdiction over the action sufficient to empower that court to change the venue of the action to a court having full jurisdiction thereover; that, under the applicable doctrines of the decisions of this Court, it was not only the right, but the duty, of that court to exercise its limited jurisdiction over the action by changing the venue to the proper court; that effecting the change of venue did not constitute a dismissal of the action in the court from which the venue was changed and the commencement of a new action in the court to which the venue was changed; and that the petitioner's action was "commenced" within the time required by Section 6 of the Federal Employers' Liability Act, notwithstanding that the change of venue, from the court having a limited jurisdiction over the action to the court having full jurisdiction thereover, took place after the time limited by that section for the commencement of the action.

It consequently follows that the decision of the Supreme Court of Illinois was in error in ruling to the contrary upon the theory that Section 6 of the Federal Employers' Liability Act conditioned recovery under that Act upon both commencing an action within the time limited and com-

mencing the action in a court having full jurisdiction thereover. Petitioner, therefore, respectfully submits that this Honorable Court should issue a writ of certiorari in order that such error may be corrected, in order that the judgment and opinion of the Supreme Court of Illinois may be reversed, and in order that petitioner may have a trial of his action upon the merits in a court having jurisdiction to hear and determine the same.

Respectfully submitted,

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